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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1472

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

VS.

PACIFIC LEGAL FOUNDATION, JOHN B. KILROY, SR., THE CITY OF TORRANCE, AND THE CITY OF LOS ANGELES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS PACIFIC LEGAL FOUNDATION AND JOHN B. KILROY, SR.

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OPINION BELOW

The opinion of the Court of Appeals is reported at 586 F.2d 650 (9th Cir. 1978).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Section 402(a)(1) of the Federal Clean Water Act, 33 U.S.C. 1342(a)(1), in requiring the Environmental Protection Agency to provide "opportunity for

public hearing" prior to any issuance, denial, or modification of a discharge permit, requires EPA to conduct adjudicatory hearings before taking action on such permits where, after due notice of the proposed action, no one requests a hearing before the action is taken and a request made subsequently raises no material issue of fact.[1]

STATUTES AND REGULATIONS INVOLVED

The following citations are to statutes and regulations involved in this action which were not included in the Brief for the Petitioner.

1. Section 101(e) of the Federal Clean Water Act, 33 U.S.C. § 1251(e), provides:

> "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States shall develop and publish regulations specifying minimum guidelines for public participation in such processes."

2. Sections 105.1, 105.2, and 105.7 of Title 40, Code of Federal Regulations, as promulgated by EPA on August

[1]The Court should note that the question as stated above is that upon which the writ of certiorari is granted. It includes incorrect factual assumptions that due notice was given and that the hearing request raised no material issue of fact. The question presented in the Brief for the Petitioner has been substantially modified from what was presented by petitioner in its Petition for Writ of Certiorari.

23, 1973, state in part as follows (38 Fed. Reg. 22,756 (1973)):[2]

> **"§ 105.1 Scope.**
>
> "This part sets forth minimum guidelines for public participation in the processes of development, revision and enforcement of any regulation, standard, effluent limitation, plan or program under the Federal Water Pollution Control Act, as amended (Public Law 92-500; 86 Stat. 816; 33 U.S.C. 1251), in accordance with section 101(e) of the Act. This part is applicable to all Environmental Protection Agency (EPA) components concerned with the Federal Water Pollution Control Act...."
>
> **"§ 105.2 Policy and Objectives.**
>
> "Participation of the public is to be provided for, encouraged, and assisted to the fullest extent practicable consistent with other requirements of the Act in Federal and State government water pollution control activities. The major objectives of such participation include greater responsiveness of governmental actions to public concerns and priorities, and improved popular understanding of official programs and actions. Although the primary responsibility for water quality decision-making is vested by law in public agencies at the various levels of government, active public involvement in and scutiny of the intergovernmental decision-making process is desirable to accomplish these objectives. Conferring with the public after a final agency decision has been made will not meet the requirements of this part. The intent of these regulations is to foster

[2]These regulations are presented as they were in effect at the time the challenged action was taken. They have since been substantially revised to include the public participation requirements of other acts in addition to the requirements of the Federal Clean Water Act. *See* 44 Fed. Reg. 10,292 (1979).

a spirit of openness and a sense of mutual trust between the public and the State and Federal agencies in efforts to restore and maintain the integrity of the Nation's water."

"§ 105.7 Guidelines for Public Hearings.

"Any public hearing, whether mandatory or discretionary, to be held under the Act shall be in conformity with this section. If conflict exists between the minimum guidelines of this section and requirements of State or Federal law or other regulations pertaining to a particular hearing, the more stringent requirements shall be observed.

"(a) *Purpose.*—Generally, a public hearing gives persons and organizations a formal opportunity to be heard on a matter prior to decision-making. Although public hearing testimony may focus on the prospective action to be taken in the form of a tentative plan or decision, the final actions shall benefit from and reflect consideration of the public hearing content.

. . . .

"(c) *Opportunity for Hearings.*—Where the opportunity for public hearing is called for in the Act, and in other appropriate instances, a public hearing shall be held if the hearing official finds significant public interest (including the filing of requests or petitions for such hearing) or pertinent information to be gained. Instances of doubt should be resolved in favor of holding the hearing, or if necessary, of providing alternative opportunity for public participation."

3. Sections 125.5 and 125.35 of Title 40, Code of Federal Regulations, as promulgated by EPA on July 24, 1974, state in part as follows (39 Fed. Reg. 27,079 (1974)):[3]

[3]These regulations have since been revised. *See* 44 Fed. Reg. 32,854 (1979).

"§ 125.5 Delegation of authority.

"(a) . . . the following authorities are hereby delegated to each of the Regional Administrators for the area which he administers.

"(1) The authority to issue and condition permits or to deny applications for permits for discharge covered by the NPDES and by section 405 of the act.

. . . .

"(c) These authorities may be redelegated to the Director, Enforcement Division, of each region."

"§ 125.35 Issuance and Effective Date of Permit.

. . . .

"(b)(1) Where the determinations of the Regional Administrator pursuant to paragraph (a) of this section with respect to any permit are substantially unchanged from the tentative determinations and draft permit prepared pursuant to § 125.31 of this subpart, the Regional Administrator shall forward a copy of the determinations to any person who has submitted written comments regarding the permit."

STATEMENT OF THE CASE

The Federal Clean Water Act (Act), 91 Stat. 1566, 33 U.S.C. §§ 1251, *et seq.*, sets forth a comprehensive scheme to insure public participation in all phases of the administration of the Act. The specific duties placed on the Administrator of the Environmental Protection Agency require not only that he "provide for" public participation, but also that he take affirmative action to insure that such participation is "encouraged" and "assisted." 33 U.S.C. § 1251(e). This case involves an attempt by a public interest organization, Pacific Legal Foundation

(PLF), and an individual citizen, John B. Kilroy, Sr., to obtain an opportunity for a hearing on the issuance of a National Pollutant Discharge Elimination System (NPDES) permit for the City of Los Angeles Hyperion Wastewater Treatment Plant (Hyperion). The purpose of the hearing is to present to EPA, on a public record, information and arguments relating to the adverse impacts on people, fish, and wildlife which are certain to result from the implementation of EPA requirements for modifying the processing of wastewater at Hyperion.

Wastewater discharge requirements for Hyperion were set in an NPDES permit issued to the City of Los Angeles in August, 1975. A at 21. The permit required the City to cease its twenty-year-long practice of discharging digested sewage sludge[1] through a seven-mile-long outfall to a point over 300 feet below the surface of the Pacific Ocean at the mouth of a substantially deeper submarine canyon. This permit expired by its terms on February 1, 1977. A at 19. During 1976, a substantial public controversy arose when EPA announced for the first time that the alternative sludge disposal method would involve transporting millions of tons of sludge through the streets of Los Angeles in huge trucks for disposal in landfills near residential neighborhoods. During the same period, information

[1]Sewage sludge is defined as:
"A nonhomogenous residue resulting from chemical and physical treatment of waste water." Report to the Congress by the Comptroller General of the United States, *Problems and Progress in Regulating Ocean Dumping of Sewage Sludge and Industrial Wastes,* January 21, 1977.
At Hyperion, raw sludge is processed in anaerobic digestors which, with the addition of steam, convert the substance to methane gas, carbon dioxide, water vapor, and a residual substance called digested sludge.

was released from ongoing, intensive studies of the coastal waters of Southern California which showed no significant environmental impacts from the twenty years of sludge discharges. A at 76. The studies also indicated that the sludge discharge puts great amounts of nutrients into the marine waters and supports much of the marine life in Santa Monica Bay, including the best sport fishing areas. The alternative of trucking and dumping the sludge on land has many significant adverse environmental and social effects, even though many millions of dollars will be expended to implement this requirement. A at 64-65, 76-78, 200-04.

In the midst of this controversy, EPA initiated proceedings to issue a new permit for Hyperion. The notice expressly stated that a proposal was under consideration "to revise waste discharge requirements including effluent limitations and special conditions" for Hyperion. A at 206. During these proceedings, PLF objected to the appropriateness of the existing permit requirements and stated:

> "No similar requirement should be included in a future permit until a full environmental analysis, including economic and social factors of the ocean discharge of effluent and sludge, has been completed. As soon as possible, a new NPDES permit should be issued to the City of Los Angeles including only those conditions necessary to provide adequate protection to the marine environment directly affected by the discharge from the Hyperion Plant." A at 88.

The basis for this request was the need to consider "substantial scientific and technical information" which indicated that the modifications to Hyperion required in the

existing permit "would be environmentally, economically and socially undesirable." A at 87. To fully address the issues necessary to develop new permit requirements, PLF requested that EPA establish "a comprehensive environmental review . . . which would conform to the full requirements for study, analysis, public participation, open disclosure and open decision making of [the Act and other applicable laws]." *Id.* By filing these comments, PLF had become a participant in the permit proceedings and had requested a full hearing on the permit requirements.

On January 24, 1977, EPA announced that it did not have "[a]dequate review time" to consider "tentative waste discharge requirements" and issued an interim order delaying action on the City of Los Angeles' application for a new permit and extending the expiration date of the old permit to June 30, 1977. A at 93-95.

At some point after January 24, 1977, and before April 27, 1977, when EPA issued its notice of the action which resulted in this lawsuit, EPA decided to alter drastically the nature of the permit proceedings. The review of the sludge processing requirements, which had been requested not only by PLF but also by the City of Los Angeles (A at 65) and the Los Angeles Area Chamber of Commerce (A at 73), was abruptly and without explanation terminated.[5] A decision was made to extend the expiration date of the old permit to December 17, 1979. A at 117. Although PLF

[5]EPA appears to suggest that the April 27, 1977, notice announced a separate proceeding. Brief for the Petitioner at 12. However, the application for NPDES permit contained in the certified record is the one upon which the proceeding was initiated in December, 1976, and for which no final order had been entered. Certified Record at 81-118. The record also contains a suggestion by the California Regional Water Quality Control Board that EPA defer final action on the permit application until a date after the February 1, 1977, expiration date. Certified Record at 119.

was active as an interested person in the sludge controversy and had filed as a participant in the permit proceedings, requesting EPA to go through "the full requirements for . . . public participation, open disclosure and open decision making" (A at 87), PLF was given no notice of the intent to terminate the proceeding (Brief for the Petitioner at 12 n.9).

The basis for the decision by EPA to terminate the development of revised permit requirements has not been explained either in the record of the administrative proceedings or in the many documents outside the record submitted to the Court of Appeals. The only apparent, intervening, related event was the filing of a lawsuit on February 14, 1977, in which PLF, John B. Kilroy, Sr., as a member of PLF, four Los Angeles City Councilmen, and the City of Torrance, California, sought to obtain a court order to require EPA to conduct the desired review of the scientific data and environmental impacts related to the implementation of the sludge processing requirement.[6] One of the purposes of this lawsuit was to determine which sludge processing requirements were outside the scope of the NPDES permit and, therefore, subject to consideration pursuant to the requirements of the National Environmental Policy Act,[7] and to determine which requirements were within the scope of the permit and, therefore, subject to consideration in the permit proceeding. A at 134, 143-44.

[6]*PLF v. Quarles*, 440 F. Supp. 316 (C.D. Cal. 1977), *appeal pending*, No. 77-3844 (9th Cir.).

[7]Section 511(c) of the Federal Clean Water Act, 33 U.S.C. § 1371(c), exempts the issuance of an NPDES permit from the requirements for the preparation of an environmental impact statement.

It was during oral argument in the District Court on May 23, 1977, that PLF was first notified that the effort to modify the permit requirements in which it was involved was being terminated. A at 145.

Attempts subsequent to that hearing to obtain information from the EPA Regional Office on what action had been taken and when it had occurred were rebuffed. A at 157. On June 10, 1977, PLF in desperation sent a Freedom of Information Act request to attempt to find out the date of the action and obtain a copy of the decision and the supporting documents. *Id.* On June 13, 1977, the day the Freedom of Information Act request was received by EPA, PLF was notified by telephone that EPA's action had been taken on June 2, 1977, and that a request for an adjudicatory hearing would be accepted only if filed that day. A protective request for hearing was rushed to EPA by mailgram. A at 159. This request was prepared in a vacuum. EPA had released no information to PLF other than the date of the action, and continued to withhold all information about the action taken until June 23, 1977. A at 171. This same day, EPA denied the request for adjudicatory hearing on the basis that the request had not identified any of the factual issues relevant to the action taken. A at 166. EPA then certified three "issues of law" which related to whether public participation should have been allowed in the permit issuance. These issues had no relationship to the impact on people, fish, and wildlife which would result from the Hyperion modification. A separate process was initiated by EPA to resolve EPA's selected issues. A at 168.

This petition for review of the Administrator's action was then filed to obtain a court order to reopen the administrative proceeding for consideration of the terms, conditions, and requirements contained in the permit for the Hyperion plant.

The Court of Appeals determined that on "the special circumstances of this case" (586 F.2d at 659), no opportunity for hearing was provided. The Court of Appeals indicated that "[t]he analysis supporting this conclusion must commence with *Marathon Oil Co. v. EPA,* 564 F.2d 1253, 1262 (9th Cir. 1977)." 586 F.2d at 658. In *Marathon Oil* the court had previously determined that the *type* of hearing required by Section 402(a)(1) of the Act was governed by 5 U.S.C. § 554. However, since neither *Marathon Oil* nor 5 U.S.C § 554 governs whether a hearing must be held, the court made no further reference to *Marathon Oil* or to 5 U.S.C. § 554 except to emphasize "the strong policy in favor of holding public hearings before an adjudicative decision is made." 586 F.2d at 659. Instead, the court followed "the observations of the court in *Independent Bank Ass'n of Georgia v. Board of Governors of the Federal Reserve System,* 516 F.2d 1206 (D.C. Cir. 1975), concerning the 'opportunity for hearing' provision." 586 F.2d at 658. In that case, the District of Columbia Circuit stated that, where Congress has plainly given interested parties the right to a full hearing, the agency has a burden to justify a refusal to provide a hearing. 516 F.2d at 1220.

In addition, the Court of Appeals determined that there were several factual issues which should have been determined on an administrative record but "with respect to which the record in this case is silent." 586 F.2d at 659.

The existence of these issues convinced the court that a hearing should be held, especially in light of the special circumstances of this case, including the overlapping of federal and state regulatory authorities, the request by Kilroy for a hearing, and the failure of EPA to provide any explanation of its action. 586 F.2d at 659-60.

SUMMARY OF ARGUMENT

The primary basis for the Petition for Writ of Certiorari was an asserted conflict between the decision of the Court of Appeals and the decision of this Court in *National Independent Coal Operators' Association v. Kleppe,* 423 U.S. 388 (1976). The question presented in the Brief for the Petitioner, however, has been substantially modified so as to remove that issue and inject a new issue not previously raised regarding the type of hearing which must be held for the issuance of an NPDES permit. For this reason, it is suggested that the writ should be dismissed as improvidently granted.

The Brief for the Petitioner also seeks an opinion as to the validity of certain EPA regulations imposing "threshold requirements" on interested persons seeking a hearing. Review of this question is unnecessary and would not change the results of the decision below. PLF and Kilroy did not challenge the facial validity of EPA's regulations. The issues presented and decided in the Court of Appeals claimed EPA had violated or erroneously applied the pertinent regulations. The decision below did not hold any regulation to be invalid.

On the facts of the case, the principal issue is the holding of the Court of Appeals that EPA was obligated to hold a

hearing prior to issuing the Hyperion permit or to demonstrate to the court that a public hearing was unnecessary. This holding is supported by the Legislative History of the Act which shows that the hearing requirement of Section 402(a), 33 U.S.C. § 1342(a), of the Act was established as part of a comprehensive public participation program. The requirements of Section 101(e), 33 U.S.C. § 1251(e), of the Act that the Administrator encourage and assist public participation apply to the NPDES hearings. EPA's own public participation regulations (40 C.F.R. Part 105) are also expressly made to apply to the NPDES hearings. Since the facts of this case meet the requirement in those regulations that hearings shall always be held if there is "significant public interest" or "pertinent information to be gained," the Administrator clearly erred in not providing a hearing and the court could reach no other conclusion on a record "barren of any explanation." 586 F.2d at 660.

The possibility of effective public participation in the permit action was frustrated by EPA's failure to give notice of its proposed action to PLF, Kilroy, or other interested persons. EPA's regulations adopt the general principle that notice must be "circulated in a manner designed to inform interested and potentially interested persons." 40 C.F.R. § 125.32(a). EPA had the addresses for both PLF and Kilroy, who were well established as persons interested in the Hyperion permit. However, EPA's only notice for public participants was a fine print announcement in the legal notices section of the *Los Angeles Times,* a form of notice well established to be inadequate when addresses are available.

The last chance for any public participation was lost when EPA refused to disclose any information about what it was doing in the days immediately before and after the challenged action was taken. PLF had inadvertently learned during a court hearing that EPA was taking some form of action on the Hyperion permit. EPA, however, would not release any information about the action and required that a request for adjudicatory hearing be prepared and filed on a few hours notice with no knowledge of the actual substance of the action or the procedures employed. These actions by EPA, which violated provisions of law and regulation as well as any concept of fair procedure, excused the lack of specificity in the hearing request. EPA nevertheless denied the hearing request on the technical basis that it failed to specify material issues of fact. This claimed basis for refusing the requested hearing is utterly without merit, since EPA admitted to the Court of Appeals that the request for hearing raised factual issues relating to the controversial sludge processing requirements in the permit.

The opinion of the Court of Appeals gives full effect to the strong policy expressed by Congress that there would be full public participation in the NPDES program. Moreover, since the hearing requirement which the court enforced is consistent with the existing requirements of EPA's regulations, the decision achieved a desired result without imposing significant new burdens on EPA. By forcing the Administrator to recognize the mandates of Congress for public participation, the Court of Appeals has corrected a serious shortcoming in EPA's administration of the Act.

ARGUMENT

I

THE WRIT SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

The writ of certiorari was granted to review the question:

> "Whether Section 402(a)(1) of the Federal Clean Water Act, 33 U.S.C. 1342(a)(1), in requiring the Environmental Protection Agency to provide 'opportunity for public hearing' prior to any issuance, denial, or modification of a discharge permit, requires EPA to conduct adjudicatory hearings before taking action on such permits where, after due notice of the proposed action, no one requests a hearing before the action is taken and a request made subsequently raises no material issue of fact."

In presenting the case on the merits, petitioner Administrator of the Environmental Protection Agency has made two significant changes to the question presented. All reference to the failure to request an adjudicatory hearing before the action was taken has been deleted in face of the uncontroverted fact that a request for an adjudicatory hearing was filed in the manner required by EPA regulations. A at 159. This modification in the question presented removes from the case the primary basis for the petition for writ of certiorari—the asserted conflict between the decision of the Court of Appeals in this case and the decision of this Court in *National Independent Coal Operators' Association v. Kleppe,* 423 U.S. 388 (1976). Petition at 13-16.

In his second change, the Administrator inserts the descriptive phrase "APA-type" before "adjudicatory hearings" to raise the new issue of whether Section 402(a)(1)

of the Federal Clean Water Act requires that adjudications under that section comply with 5 U.S.C. § 554. The Brief for the Petitioner focuses primarily on this question and on a related question of whether EPA's NPDES permit regulations as they existed prior to their recent comprehensive revision were valid.[8] Under the facts of this case, however, no hearing was allowed. Thus, the only question raised was whether a hearing should have been conducted at all, not the nature of the hearing required. If the proceedings are reopened for any type of hearing, PLF and Kilroy can obtain an adjudicatory hearing simply by submitting a request pursuant to EPA's regulations. 40 C.F.R. § 125.36. The ultimate conclusion of the Court of Appeals that EPA had unlawfully refused to provide an opportunity for a public hearing was not dependent upon the question of whether the hearing, if held, would be subject to 5 U.S.C. § 554. Nor was the holding of the court based on a determination that any portion of the now revised regulations was invalid.

Since the Administrator has significantly modified the question presented and seeks now to use this case merely as a vehicle to obtain an advisory opinion on questions not in issue between the parties in the court below and only casually referred to in the opinion of that court, respondents respectfully suggest that the writ of certiorari should be dismissed as improvidently granted.[9] *Jones v. Hildebrant*, 432 U.S. 183 (1977).

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[8] *See* note 2, *supra*.

[9] The Court should also be aware that the permit expires December 17, 1979. A at 149. However, EPA has not initiated procedures to issue a new permit. Thus, it appears that EPA intends to allow the controversial permit to extend beyond that date by operation of 5 U.S.C. § 558(c) and thereby avoid the mooting of this case.

II

THE VALIDITY OF EPA'S PERMIT REGULATIONS HAS NOT BEEN QUESTIONED IN THIS CASE

The Administrator insists that "[t]he issue presented in this case is whether EPA's regulations (40 C.F.R. Part 125) provide a sufficient 'opportunity for public hearing' within the meaning of Section 402(a)(1) of the Act." Brief for the Petitioner at 17. The Administrator apparently reaches this issue by assuming that he had fully complied with all requirements of law and regulation relating to public participation in the issuance of an NPDES permit. This assumption is false. The procedural challenges which PLF and Kilroy took to the Court of Appeals were based on the failure of EPA to fulfill its obligation under the Act and its own regulations which require public participation and the involvement of interested and potentially interested persons. The real issues are whether EPA violated its public participation regulations (40 C.F.R. Part 105) by failing to give notice to PLF and Kilroy or to provide for, encourage, and assist their participation in a hearing on the action taken; and whether EPA violated or erroneously applied the NPDES permit regulations when it failed to give direct notice of the proposed action to PLF and Kilroy, refused to release information on the action when taken, and denied a written request for an adjudicatory hearing.

Nowhere in the opinion below does the court state that any part of EPA's regulations is invalid. The Court of

Appeals concluded that on the facts of this case the Administrator had not demonstrated that he had met his public participation obligations in this particular permit action. The arguments which follow demonstrate that this conclusion is fully supported by the requirements of the Act and EPA's regulations when applied to EPA's questionable conduct in this case.

III

THE COURT OF APPEALS PROPERLY DETERMINED THAT EPA HAD FAILED TO DEMONSTRATE THAT AN ADEQUATE OPPORTUNITY FOR A HEARING HAD BEEN GIVEN

The focal point of the concerns of EPA is the conclusion by the Court of Appeals that a showing "must be made to demonstrate that adequate opportunity for a hearing has been given. The necessity of a hearing turns not only on the vigor with which the parties clamor for one but also on whether a showing has been made demonstrating that a hearing is unnecessary." 586 F.2d at 658. The reasonableness of this conclusion must be examined in light of the law and regulations which apply to the procedures in question.

This case arises in the context of requirements of law much more comprehensive than a bare mandate that an opportunity for hearing be provided. The hearing provisions of the Act were intended to accomplish far more than simply to provide for adjudication of pertinent factual questions. It was the intention of Congress that all aspects of the Act would be "administered and enforced in a fishbowl-like atmosphere." *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 249 (1973) (hereinafter cited as Leg. Hist.). This

purpose was to be accomplished through a comprehensive public participation program which would include the public hearing requirements as one element. Although Section 402(a) establishes the requirement for a hearing, the provision of law governing the manner in which the hearing is to be provided is Section 101(e) of the Act:

> "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States."

The interlocking of the requirements of Sections 101(e) and 402(a) of the Act was emphasized by Representative Dingell during the House debate on overriding the President's veto:

> "I reiterate my comments on the importance of section 101(e) of this bill which encourages public participation in the development, revision and enforcement of various actions taken under this statute. I sincerely hope that the Administrator understands that this applies across the board, including the establishment of the permit program under section 402 of the bill." Leg. Hist. at 108.

Far from understanding this relationship, the Administrator rejects it. He argues that his entire obligation under the Act was met by the publication of nine inches of single-column fine print in the legal notice section of the *Los Angeles Times*. A at 128. He supports his action by claiming that the burden rests entirely on the would-be public participants:

> "That the public fails to make a satisfactory request does not mean that it was not provided with an opportunity to do so. To the contrary, the opportunity was provided, but not accepted." Brief for the Petitioner at 27.

The Act requires more. "The public must have a *genuine* opportunity to speak . . . ." Leg. Hist. at 1490 (emphasis added). Even if it is assumed that the minimal action of the Administrator fulfilled the obligation to provide for a hearing, there was not even a minimal effort to either encourage or assist public participation in the permitting process.

The Legislative History repeatedly emphasizes the importance of public participation in the NPDES control program under Section 402 of the Act:

> "An *essential element* in any control program involving the nation's waters is *public participation*. The *public* must have a *genuine opportunity* to speak on the issue of protection of its waters. The Committee has therefore established requirements to provide opportunity for public hearing . . . . *The scrutiny of the public* and the exercise of authority under [Section 402] is *extremely important* in insuring expeditious implementation of the authority and a high level of performance by all levels of government and discharge sources." Leg. Hist. at 1490 (emphasis added).

In very strong language, the Legislative History states that the purpose of the hearing requirement is to force a reluctant EPA to accept input on a "public record" on matters it might prefer to decide without public scrutiny:

> "[T]he Committee is also concerned that this movement to the courts may have been brought about by inadequate recognition on the part of the administrative agencies as to the proper role of the public. Time and time again during the hearings evidence was submitted as to decisions made by Federal agencies without appropriate consultation with the State and local governments or the general public. And what is true about the Federal agencies is also true of the State and local government agencies. It is with the understanding that steps are necessary to restore the public's confidence and to open wide the opportunities for the public to participate in a meaningful way in the decisions of government, that the Committee has included in the proposed legislation various steps to arrive at this goal. First, the Committee has included provision for public participation in the development, revision and enforcement of any regulation, standard or effluent limitation established by the Administrator or any State under this Act. Not only is this specifically required in section 101(a) [*sic*] but the *Administration is directed to encourage this participation.* Second, the Committee has included provision in most instances where a determination is to be made by the administrator or the State, that *such determination shall be made as part of a public record.*" Leg. Hist. at 819 (emphasis added).

The hearing required by Section 402(a) serves the dual purpose of adjudicating pertinent facts and developing required advice and consultation from the public. The hearing requirement in Section 402(a) was inserted as part of a program woven through the Act intended "to open wide the opportunities for the public to participate in a meaningful way" in order "to restore the public's confidence"

in the decisions of EPA so as to lessen the tendency toward "having the forum for decision-making be in the courtroom." Leg. Hist. at 819. *See also State of Alabama ex rel. Baxley v. Environmental Protection Agency*, 557 F.2d 1101, 1110 (5th Cir. 1977).

The Administrator acknowledges that Section 101(e) of the Act applies to the NPDES permit program and requires him to use the Section 402(a) hearings not only to adjudicate facts but also to obtain public participation. Brief for the Petitioner at 32. Yet, in practice, he utterly ignores this obligation to use the hearing process as a wide open means of communicating with the public at large. In this case he took a major permitting action for a controversial permit for one of the largest urban areas in the country with absolutely no public participation at all. It is undisputed that EPA did nothing to encourage and assist public participation in this major action. Even worse, the record clearly shows that EPA officials engaged in a practice of withholding information, issuing an obscure and confusing notice, and taking the exceptional actions of terminating cooperative consideration of permit requirements and unilaterally extending the expiration date of the controversial permit. These actions made effective public participation impossible. Moreover, when PLF and Kilroy discovered what was going on and attempted to raise a challenge, EPA withheld all information, demanded that the challenge be filed on a few hours notice without benefit of any information or explanation of what had occurred, and then asserted "threshold barriers" to block any form of public participation.

These improper actions not only violated the clear intent of Congress, but also directly contravened the requirements of EPA's regulations implementing Section 101(e) of the Act which were in effect at the time the hearing was refused. These regulations explicitly applied the public participation requirements of Section 101(e) of the Act to the hearing requirement of Section 402(a) of the Act.

> "Any public hearing, whether mandatory or discretionary, to be held under this Act shall be in conformity with this section. If conflict exists between the minimum guidelines of this section and . . . other regulations pertaining to a particular hearing, the more stringent requirements shall be observed." 40 C.F.R. § 105.7.

The requirements of this section of the regulations make it clear that the Administrator had an obligation under the circumstances of this case to provide a public hearing regardless of whether one was expressly requested:

> "Where the opportunity for a public hearing is called for in the Act, and in other appropriate instances, a public hearing *shall* be held if the hearing official finds significant public interest (including the filing of requests or petitions for such hearing) or pertinent information to be gained. *Instances of doubt should be resolved in favor of holding the hearing, or if necessary, of providing alternative opportunities for public participation.*" 40 C.F.R. § 105.7(c) (emphasis added).

The more stringent requirements for the provision of hearings which are placed on EPA's staff by this section supercede any "threshold requirements" on would be participants found elsewhere in the regulations. 40 C.F.R.

§ 105.7. Therefore, without regard to any individual request for a hearing, EPA was obligated to conduct a hearing if (1) there was significant public interest in the permit, or (2) there was pertinent information to be gained. Moreover, such hearings were required unless the Agency established beyond "doubt" that there was no significant public interest or pertinent information to be gained. In the event no "hearing" was to be allowed, the Regional Administrator was under an additional obligation to provide an alternative opportunity for public participation. No such alternative opportunity was provided.

The record before the Court of Appeals clearly established that "significant public interest" existed in this particular permitting action. A at 63-88, 129-47, 200-04, Among the concerns raised by public expression was "[t]he need for this additional notice and the required holding of hearings" concerning the manner in which sludge disposal was to be handled at Hyperion. A at 79. The Regional Administrator had even signed a sworn affidavit in which he acknowledged the existence of the "controversy" over the question of the sludge processing requirements at Hyperion. A at 111.

On the question of "pertinent information to be gained," the prior communications to EPA had emphasized the importance of EPA considering the "substantial scientific and technical information" which would require a modification of the permit requirements. A at 87. EPA was even informed of the primary source of this information. A at 76. Nonetheless, no opportunity to submit the pertinent information was allowed.

The Court of Appeals also identified the need under the facts of this case for an opportunity to present pertinent

information relating to "the division of jurisdiction over discharges in the ocean between the federal and state authorities which significantly complicates compliance by an affected agency." 586 F.2d at 659. EPA was clearly aware of the fact that a conflict existed between the compliance dates established in the permit by EPA and those established by the co-permitting authority, the California Regional Water Quality Control Board. A at 18, 54-62. Some form of hearing or alternative procedure was obviously required to resolve this conflict, particularly since the modifications to Hyperion controlled by these inconsistent compliance dates were the center of the public controversy. The Court of Appeals' conclusion that the "reasonableness of the EPA's compliance schedule depends upon facts that may be disputed and with respect to which the record in this case is silent" (586 F.2d at 659) is fully supported by the record.

The Court of Appeals had before it uncontroverted evidence that EPA was aware that interested persons were anxious to participate in a review of the permit conditions and that, as provided in 40 C.F.R. § 105.7(c), there was "significant public interest" and "pertinent information to be gained." *See* 586 F.2d at 659 n.3. Since the principal purpose of the Section 402(a) hearing requirement was to force EPA to obtain such input before making decisions on permits and since Section 105.7(c) of EPA's regulations required that a hearing "shall" be held under such circumstances, EPA was clearly obligated to have conducted a hearing. Yet, the record "is barren of any explanation of the extension of June 2, 1977,"[10] 586 F.2d at 660. Under

[10]EPA suggests that the reasons for the action taken were explained in its published notice. Brief for the Petitioner at 33 n.22. In the four-page notice (A at 117-20), however, only two sentences describe the action being taken (A at 118, last paragraph). No reasons are stated.

these facts, the Court of Appeals was justified in concluding that EPA was obligated to explain why a hearing was unnecessary and that in the absence of an adequate explanation EPA had failed to demonstrate that it had provided an adequate opportunity for a hearing as intended by Congress.

IV

EPA DID NOT PROVIDE DUE NOTICE OF ITS DECISION TO TERMINATE CONSIDERATION OF REVISED DISCHARGE REQUIREMENTS

A fundamental requirement of due notice is that it be communicated in a manner " 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Memphis Light, Gas and Water Div v. Kraft,* 436 U.S. 1, 13 (1978), *quoting from Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 314 (1950). EPA's regulations adopted this standard as a basic requirement governing notice of NPDES permit actions:

> "Public Notice of the proposed issuance, denial or modification of every permit or denial shall be circulated in a manner designed to inform interested and potentially interested persons of the discharge and of the proposed determination to issue, deny or modify a permit for the discharge." 40 C.F.R. § 125.32(a).

In cases since *Mullane,* this Court has consistently rejected claims that a fine print newspaper notice will satisfy a requirement that a notice be reasonably calculated to apprise interested parties when the government agency involved could obtain names and addresses for direct notice. *See, e.g., Schroeder v. City of New York,* 371 U.S. 208, 211-13 (1962). EPA had addresses for both PLF and

Kilroy who were well established prior to April 27, 1977, as persons interested in the Hyperion permit. Not only had PLF filed written comments in the permit proceeding then underway (A at 84), but also PLF and Kilroy had been engaged in active litigation with EPA for over two months attempting to determine which of the alternative sludge processing requirements for Hyperion were conditions in the permit and which were merely grant conditions (A at 129). In spite of this activity and the public controversy which had forced EPA to agree to prepare an environmental impact statement on the sludge processing requirements (A at 111), the notice was sent only to the City of Los Angeles, the California Regional Water Quality Control Board, and four federal offices (A at 115-16). No effort was made to contact PLF, Kilroy, or any other public participants.

EPA has not suggested that it designed its manner of communicating notice so as to reach either PLF at its Sacramento, California, office or Kilroy in Los Angeles. Instead, EPA claims a technical defense that the regulations require no more than what was done. Brief for the Petitioner at 36 n.5. This claim relies on the minimum provisions of 40 C.F.R. §§ 125.32(a)(1) and (2) and ignores the principal notice requirement contained in 40 C.F.R. § 125.32(a) that notice procedures in each case must be "designed to inform interested and potentially interested persons." As recognized by the Court of Appeals, publication of a small notice in the back pages of a major metropolitan newspaper is hardly designed to inform an interested organization located over 350 miles away or even a

specific interested person among the millions of inhabitants of the general Los Angeles area. 586 F.2d at 659 n.3.

EPA also suggests that "[t]he Court of Appeals did not question that EPA had complied with its notice-and-hearing regulations." Brief for the Petitioner at 16. To support this assertion, citation is made to 586 F.2d at 653-54, the "Background" section of the opinion where the court merely recites the events which occurred. Contrary to EPA's suggestion, the Court of Appeals did address the issue of adequacy of notice and decided it adversely to EPA. The court took up PLF's and Kilroy's challenge to the adequacy of the notice[11] within the context of the question of whether under the facts of this case the right to a hearing had been waived. 586 F.2d at 658-59 n.3. The court distinguished between the direct notice given the City of Los Angeles (petitioner in the consolidated action before the Court of Appeals) and the newspaper notice given PLF and Kilroy. The court concluded that the newspaper notice was inadequate to establish that PLF and Kilroy had been given an adequate opportunity for a hearing. This conclusion necessarily entails a finding either that EPA failed to circulate the notice in a manner designed to inform PLF and Kilroy as required by the regulations or that EPA's regulations failed to fulfill the public participation requirements in the Act. Since the court would have clearly stated any intention to invalidate the regulations (which

[11]The challenge to the adequacy of the notice, in addition to raising the issue of the manner of communication, also set forth that the permit referred to in the notice was the 1974 permit which had been rescinded, not the 1975 permit which was actually extended. In addition, the notice failed to identify which of the various conflicting sludge compliance schedules was to be required.

apply to every other NPDES permit action), it is apparent that the court concluded that it was EPA's actions in this case which were invalid, not EFA's regulations.

V

THE REQUEST FOR ADJUDICATORY HEARING ADEQUATELY RAISED FACTUAL ISSUES RELATING TO THE SLUDGE PROCESSING REQUIREMENTS IN THE HYPERION PERMIT

The Administrator in his brief emphasizes his right to impose "reasonable threshold requirements" on persons seeking to obtain an opportunity for a public hearing under the Act. Brief for the Petitioner at 21-29. In so doing, he attempts to place at issue before this Court the validity of his regulation which required persons who desired an adjudicatory hearing to state issues of fact. The question of the validity of this regulation was not raised before the Court of Appeals. This Court will find no mention of this issue or of the particular regulation in the decision for the reason that EPA *admitted* that the request for adjudicatory hearing raised issues of fact relating to sludge disposal requirements:

> "Given a second chance to request a hearing under 40 C.F.R. § 125.36, only one Petitioner (Kilroy) took advantage of it, and his request raised only procedural legal issues and issues concerning the land-based sludge disposal method used to implement the sludge phase-out conditions of the permit." Brief for Respondents (before the Court of Appeals) at 38 (footnote omitted).[12]

[12]For the convenience of the Court, this brief has been lodged with the clerk.

This admission was repeated:

> "Even petitioner Kilroy's request for an adjudicatory hearing refers to the interim sludge project." Brief for Respondents (before the Court of Appeals) at 39-40.

EPA's explanation for not allowing a hearing on these issues was simply that it considered them to be irrelevant to the permit provisions. Brief for Respondents (before the Court of Appeals) at 36-37. Since the Court of Appeals decided that the issues admittedly raised by the request were relevant and should have been adjudicated before the permit was extended (586 F.2d at 659), the validity of the regulation was not placed in issue.

Before this Court, the Administrator does not seek review of the determination by the Court of Appeals that the factual issues concerning the sludge processing requirements are matters which should be addressed in a proper hearing. Instead, he attempts to take back his admission as to the facts and litigate for the first time in this Court a challenge to the validity of his own regulation—a challenge which only he has raised.

Even if this Court decides to disregard the admission of facts before the court below, the issue of the facial validity of 40 C.F.R. § 125.36(c)(1) still is not raised by this case. The claim of PLF and Kilroy is that they had substantially complied with the requirement in the regulation to raise factual issues and that EPA misused the regulation in a manner which violated other provisions of the Act and the regulations.

The requirement that a request for an adjudicatory hearing raise factual issues must be applied in a manner consistent with the public participation requirements of

Section 101(e) of the Act. As EPA's own regulations provide, any question of doubt should be resolved in favor of holding the requested hearing. 40 C.F.R. § 105.7(c). Within the context of (1) the controversy over the sludge processing requirements, (2) EPA's agreement to study the environmental claims which had been raised relating to the sludge processing requirements, and (3) the confusion and lack of information over what EPA had in fact done on June 2, 1977, the mailgram communicates as much information as can reasonably be expected on the request to adjudicate on an adequate record the environmental impacts of the permit requirements for sludge processing.

Any lack of specificity in the mailgram request was caused by EPA's own misconduct in refusing to release information on what had occurred[13] and withholding notification of the date the action was taken until the day the hearing request was demanded. Under these circumstances, a deliberate narrow reading of the request for hearing by EPA cannot be sanctioned. *Cf. Save our Sound Fisheries Association v. Callaway,* 429 F. Supp. 1136, 1144 (D.R.I. 1977) (EPA's violations of the Act prevented plaintiffs' filing a timely notice of citizen's suit.)

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[13]In failing to provide PLF with a copy of the decision, EPA violated the requirement of its own regulations that "the Regional Administrator shall forward a copy of the determination to any person who has submitted written comments regarding the permit." 40 C.F.R. § 125.35(b)(1). PLF had submitted such written comments when the proceeding was first initiated. A at 84. The refusal to provide PLF with a copy of the final decision was also a violation of 5 U.S.C. § 552(a)(2). It should be noted that to this day EPA has not produced the decision itself. The only document produced is a letter from a staff member (Terry L. Stumph) whose position is not described. This letter only communicates that the decision had been made. A at 149-50. The decision itself had to be made by either the Regional Administrator (Paul DeFalco, Jr.) or the Director, Enforcement Division (R. L. O'Connell). 40 C.F.R. §§ 125(a)(1) and (c).

VI

THE REQUIREMENTS IMPOSED BY THE COURT OF APPEALS DO NOT PRESENT A SERIOUS HINDRANCE TO EFFECTIVE ADMINISTRATION OF THE ACT

The Administrator devotes a substantial portion of his argument to the holdings in several other cases in three Courts of Appeals that the Administrative Procedure Act (APA), 5 U.S.C. § 554, applies to the issuance of NPDES permits.[14] The question of the applicability of the APA, however, does not determine the result in this case. The issue presented herein is whether a hearing of any type should have been held, and the Court of Appeals did not rely upon the prior holdings to conclude that PLF and Kilroy had not been given an opportunity for a hearing. However, the question of the applicability of the requirements of the APA is of significant public importance and must not go by default should this Court decide to address it.

To start his argument, the Administrator points to the lack of the words "on the record" in Section 402(a) of the Act. He relies on two leading cases dealing with rule making procedures which hold that, in the absence of these words, a question is raised as to whether Congress intended the formal hearing requirements of the APA to apply. Each case, however, emphasizes that the words "on the

[14]This issue was not raised in the petition for certiorari, but has been added to the question presented in the Brief for the Petitioner. The three cases which reached this holding are *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977); *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977); and *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978).

record" are *not* required in the statute and that the holdings of the cases do not apply to adjudication.

> "We do not suggest that only the precise words 'on the record' in the applicable statute will suffice to make §§ 556 and 557 applicable to rulemaking proceedings." *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972). *See also United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 238 (1973).
>
> "[T]hese decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." *Florida East Coast Railway Co.*, 410 U.S. at 245. *See also Allegheny-Ludlum*, 406 U.S. at 757.

The question presented is significantly different when the agency action is an adjudication rather than rule making. Unlike rule making, adjudications have a direct effect on individuals and are oriented to the facts of the particular case. Moreover, rule making actions not subject to Sections 556 and 557 of the APA are governed by the alternative "notice and comment" procedures in Section 553. However, if Section 554 of the APA does not apply, there is no alternative procedure for adjudication in the APA. The courts, therefore, are obligated, as each of the circuits to address this issue has done, to go beyond the words in a statute such as Section 402(a) of the Act to discern the intent of Congress as to the procedural protections to be provided.

Although the analyses of the requirements of Section 402(a) of the Act by the three circuits differ, each is well

reasoned and speaks for itself in identifying those factors which convincingly indicate that 5 U.S.C. § 554 applies. In *Marathon Oil*, the Ninth Circuit identified that the nature of Section 402(a) proceedings is to focus on an individual discharger in an action which is likely to be based on disputed factual matters. (The Administrator admits that "[a]ll NPDES permits involve at least the *potential* for factual dispute." Brief for the Petitioner at 35 (emphasis in original).) The court concluded that such actions were within the category of proceedings Congress sought to address in the APA. Since the Legislative History of the Federal Clean Water Act did not indicate that the APA would not apply, and since the Act provided for judicial review which could only be effective on an administrative record, the court concluded that Congress intended that Section 554 of the APA should apply. *Marathon Oil*, 564 F.2d at 1262-64.[15] The Administrator, however, argues that the Legislative History "specifically disclaims any intent to apply the strict hearing requirements of 5 U.S.C. 554." Brief for the Petitioner at 27-28. To support this claim, he cites a comment from the Legislative History that "EPA should adopt 'procedures which are expeditious.'" The full statement at this point in the Legislative History, however, expressly contradicts the Administrator's claim and supports the opposite conclusion reached by the Court of Appeals:

[15]It should be noted that the Seventh Circuit found a requirement in 5 U.S.C. § 558(c) that EPA hold adjudicatory hearings in addition to the requirement of 5 U.S.C. § 554. *United States Steel Corp. v. Train*, 556 F.2d 822, 833-34 (7th Cir. 1977). The Administrator does not challenge that independent requirement for adjudicatory hearings.

> "The language 'notice and opportunity for a hearing' of Section 311(b)(6) is not intended to impose in every instance the complex procedural requirements associated with formal adjudicatory hearings on the record before a hearing examiner such as are used for ratemaking and similar federal rule issuance. The committee believes that effective administrative enforcement will be enhanced by assessment procedures which are expeditious. Provisions of Title 5 of the United States Code commonly referred to as the Administrative Procedure Act, as amended, will *nevertheless apply* to assure due process and protection of a respondent's rights." Leg. Hist. at 804 (emphasis added).[16]

Thus, the Legislative History removes any doubt that Congress intended that the procedural protections afforded by 5 U.S.C. § 554 would apply when the Act provides an "opportunity for hearing."

The Administrator also challenges the reference by the Court of Appeals to the "strong policy in favor of holding public hearings before an adjudicative decision is made." 586 F.2d at 659. This Court, however, has recently affirmed the existence of such a policy and established that the type of proceedings required for adjudicative decisions must be determined from an analysis of the nature and effect of the decision Congress intended to be made:

[16]Later in his brief the Administrator acknowledges editing the Legislative History. He claims, however, that the entire statement is contradictory because prior to stating that the APA shall apply it indicates that "complex procedural requirements" are not intended to be required "in every instance." Brief for the Petitioner at 31-32 note 20. There is no contradiction in the statement. Section 554 of the APA does *not* require "in every instance the complex procedural requirements associated with formal adjudicatory hearings." *See infra* at 37. Moreover, it is clearly Sections 554, 556, and 557 which provide "due process and protection of a respondent's rights" in "a hearing" to which this statement refers.

> "[T]his court has been willing to assume a Congressional solicitude for fair procedure, absent explicit statutory language to the contrary. See Greene v. McElroy, 360 U.S. 474, 507-508 (1959)." *Califano v. Yamasaki,* ..... U.S. ....., 99 S. Ct. 2545, 2553 (1979).

In *Yamasaki*, this Court, relying on the "duty to make an accurate determination," the importance of "an assessment of the recipient's credibility" and "the statutory goal that 'there shall be no' recoupment when waiver is appropriate," decided that Congress intended an adjudicatory hearing would be held when a recipient requests a waiver of recoupment of overpayments under the Social Security Act. *Id.* at 2555-56. The Court reached this conclusion even though in the statutory provision in question (42 U.S.C. § 404(b)), Congress did not even mention a hearing.[17]

It is, therefore, clear that when an administrative agency makes decisions which are adjudicatory in nature, the form of procedure required is not to be determined solely from the words (or lack thereof) in the statute. The courts must look to the nature of the decision to be made and the purposes the decision is to serve. This analysis of congressional intent is appropriately conducted within the context of an assumption that Congress intended fair procedures. The Courts of Appeals were correct in applying this analytical approach to Section 402(a) of the Act.

The Administrator also uses the well worn complaint about administrative burdens to suggest that Congress

[17] 42 U.S.C. § 404(b) provides:

> "In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by, the United States from any person who was without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

could not have intended that 5 U.S.C. § 554 would apply to NPDES permit issuances. His case is far from convincing. It is not at all apparent that 5 U.S.C. § 554 and the decision of the Court of Appeals read together require anything significantly different from that which is already required by EPA's regulations governing *both* public participation *and* NPDES permit procedure.[18]

Both 5 U.S.C. § 554 and EPA's regulations contemplate a two-step procedure. Initially, there is "the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment." 5 U.S.C. § 554(c)(1). This requirement appears to fit well within EPA's provision for a "public hearing of the 'legislative' type." Brief for the Petitioner at 8. Next, there is the requirement that "to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title" must be held. 5 U.S.C. § 554(c)(2). EPA's regulations likewise provide for an adjudicatory hearing for persons dissatisfied with the initial decision. Brief for the Petitioner at 9. Therefore, EPA's regulations could be applied in a manner fully consistent with the APA.

The requirement of the Court of Appeals that an adjudicatory hearing must be conducted in this case was *not* based on a conclusion that, contrary to EPA's regulations, an adjudicatory hearing must be conducted in all NPDES permit actions. The court found under "the special circumstances of this case" (586 F.2d at 659) that there were

[18] It is noteworthy that EPA provides no information on the several years' experience with its programs in three circuits which have been requiring hearings. Apparently the program continues to function well.

interested parties who wished to adjudicate material facts upon which EPA's decision rests. The Administrator does not dispute these findings nor has he ever claimed that he was unaware of the interested parties or the issues which concerned them. His only claim has been that the parties did not present themselves and their issues to him in the precise manner he desired. Only this transparent defense was set aside by the Court of Appeals as not being acceptable in light of the requirements of law and regulation and the circumstances of this case.

The real complaint of the Administrator appears to be limited to the requirement by the Court of Appeals that EPA establish some form of record supporting its decision not to provide for any manner of public participation. EPA argues that it could not make this showing without conducting an "APA-type adjudicatory hearing" for every permit. Brief for the Petitioner at 35. Clearly, this claim is no more than a "cry of wolf."[19] Without question, the legislative type hearing can establish the necessary record showing no material issues of fact, no significant public interest, no additional information to be gained, and no doubt as to the propriety of proceeding without a formal hearing. The Court of Appeals expressly stated that with such a showing it would be required to "reconsider our holding that no 'opportunity for a hearing' was provided." 586 F.2d at 659. What is more, in the obviously routine and noncontroversial setting in which most NPDES permits are issued

[19]The Seventh Circuit found that conducting adjudicatory hearings would not be unduly burdensome on EPA. *United States Steel*, 556 F.2d at 834. The court also noted that if EPA's claims of excess burden had merit, the program would have become bogged down regardless of whether the adjudicatory provisions of the APA apply. *Id at* 834 note 14.

(40,000 out of 42,000—Brief for the Petitioner at 34), the likelihood of a challenge is remote and speculative. Therefore, the showing that a hearing was unnecessary could undoubtedly be made by an analysis of the circumstances documented in some informal manner. The Administrator does not explain how, without some showing by EPA, a reviewing court can determine whether EPA met its obligations under the Act, particularly in circumstances such as this case where the regulations require a hearing even if no request is submitted. *See* 40 C.F.R. § 105(c).

The strong emphasis in the Legislative History that Congress intended the NPDES process to be one of full participation, not only by the permittees but also by the interested public, demonstrates that the Act contemplates a burden on EPA to show that it has reasonably sought out the factual information bearing on the permitting action. EPA is not free to act without considering available, pertinent factual information on the excuse that others did not overcome administrative obstacles to urge that information on the Agency in the precise form it desires. EPA is required by the express terms of Section 101(e) of the Act not only to provide for the opportunity for a hearing but also to seek out appropriate input from the public and to encourage and assist those who can make a contribution. Therefore, the real concern raised by EPA's statistics relating to NPDES permit hearings (Brief for the Petitioner at 34) is that under its past practices EPA has granted hearings to fewer than five percent of those who requested them and for less than three-tenths of one percent of the total permits. These statistics as well as the facts of this case show that EPA is making little if any

effort to utilize the Section 402(a) hearing "to make available to the public all relevant information surrounding a discharge source and the control requirements placed upon it" or to provide public participants with "a genuine opportunity to speak on the issue of the protection of its waters." Leg. Hist. at 1490.

The highly inflated and speculative claims of administrative burden by the Administrator lack any credibility. Congress intended that hearings would generally be held to insure that EPA obtained and considered public input—a requirement the Administrator appears to have been ignoring. Since the requirements set forth by the Court of Appeals are consistent with the requirements of the Act, the fault, if any, for the burden of conducting hearings lies with Congress, not with the Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court of Appeals properly concluded that under the facts of this case EPA did not provide PLF and Kilroy with the opportunity for public hearing required by Section 402(a) of the Act. The relief ordered by the Court of Appeals is necessary and proper to correct the Administrator's established pattern of ignoring interested and potentially interested public participants and to insure that he will recognize his obligations under the Act to provide for, encourage, and assist genuine public participation in the NPDES permit process. Moreover, the Court of Appeals properly sensed the need not to allow the questionable EPA conduct which precluded any possibility of public participation in this case to occur without a calling

to account. Therefore, Pacific Legal Foundation and John B. Kilroy, Sr., respectfully request that the decision below be affirmed.

Respectfully submitted,

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